ORIGINAL

BEFORE THE ARIZONA CORPORATION COMMISSION

055

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Chairman
WILLIAM MUNDELL
Commissioner
JEFF HATCH-MILLER
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IN THE MATTER OF THE COMPLAINT OF ESCHELON TELECOM OF ARIZONA, INC. AGAINST QWEST CORPORATION	**DOCKET NO. T-03406A-06-0257** **T-01051B-06-0257** **QWEST CORPORATION'S OPENING POST-HEARING BRIEF**

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I. INTRODUCTION

For years Qwest Corporation ("Qwest") and Eschelon Telecom of Arizona ("Eschelon") developed processes to implement their interconnection agreement ("ICA") in the Commission approved Change Management Process ("CMP" or "Change Management"). Eschelon proposed hundreds of changes in CMP, of which 82% were developed into active processes. Over the years, many of the process changes developed in Change Management concerned the "Expedites and Escalations Process" (hereinafter referred to as "Expedite Process"). Despite using CMP for years as the place to "develop" processes, and despite recognizing that its ICA allows the parties to continue to modify the Expedite Process in CMP, Eschelon claims that Qwest breached the ICA because Eschelon did not agree with one of the changes to the Expedite Process developed in CMP. Specifically, Eschelon claims Qwest breached the ICA by developing a process in CMP that required all CLECs, Eschelon included, to pay Qwest a fee when it expedited due dates for unbundled loops.

Everything Qwest has done is perfectly consistent with the ICA: (1) Eschelon's ICA specifically states that Qwest "may" charge Eschelon a fee to expedite due dates; (2) Qwest developed the subject Expedite Process ("Version 30") in CMP, and Eschelon participated in the development every step of the way; (3) Version 30 simply stated that Qwest is entitled to get paid a fee to expedite orders for unbundled loops; and, (4) under both Version 30 and the emergency conditions process, Qwest appropriately rejected Eschelon's request to expedite an unbundled loop order at the Rehabilitation Center.

Eschelon's and Staff's position that Qwest breached the ICA by developing and implementing Version 30 in the CMP simply has no basis. Qwest's development of Version 30 in CMP is (1) consistent with the plain language of the ICA; (2) consistent with the parties' course of dealing to develop processes underlying the ICA in Change Management; and (3) consistent with the requirements of the 1996 Act. As a result, Qwest respectfully requests that the Arizona Corporation Commission ("Commission") reject Eschelon's breach of contract claim. Qwest also respectfully requests that the Commission reject the Staff's request for industry wide relief that has no place in a complaint case for breach of contract.

II. FACTS

A. The Parties' ICA Contains Provisions to Expedite Due Dates for Service Orders.

In 2000, Qwest and Eschelon entered into an interconnection agreement ("ICA" or "parties' ICA" or "Eschelon ICA"). Rather than negotiating its own contract, Eschelon opted into the AT&T agreement. Attachment 5 to the Parties' ICA, entitled "BUSINESS PROCESS REQUIREMENTS," contains several provisions on expediting due dates. Specifically:

> 3.2.2.12 Expedite Process: U S WEST and CO-PROVIDER shall mutually develop expedite procedures to be followed when CO-PROVIDER determines an expedite is required to meet subscriber service needs.

> 3.2.2.13 Expedites: U S WEST shall provide CO-PROVIDER the capability to expedite a service order. Within two (2) business hours after a request from CO-PROVIDER for an expedited order, U S WEST shall notify CO-PROVIDER of U S WEST's confirmation to complete, or not complete, the order within the expedited interval.

Eschelon ICA (Incorporated into the record by reference but no Exhibit No. given; hereinafter Exhibit C-1 (Contract 1)). Attachment 5 also contains multiple provisions which state that Qwest "may" charge Eschelon a separate fee for expediting an order for Eschelon:

> 3.2.4.2.1 If CO-PROVIDER requests a due date earlier than the standard due date interval, then ***expedite charges may apply***.
>
> 3.2.4.3.1 If CO-PROVIDER requires a due date earlier than the U S WEST offered due date and U S WEST agrees to meet the CO-PROVIDER required due date, then that required due date becomes the committed due date and ***expedite charges may apply***.
>
> 3.2.4.4 Subsequent to an initial order submission, CO-PROVIDER may request a new/revised due date that is earlier than the committed due date. If U S WEST agrees to meet that new/revised due date, then that new/revised due date becomes the committed due date and ***expedite charges may apply***.

Exhibit C-1 (emphasis added). In order to succeed on its breach of contract claim, Eschelon has the burden of proof, and must show that Version 30 to the Expedite Process conflicts with one of these provisions of its ICA. Eschelon cannot meet its burden.

B. The Parties Consistently Used the Change Management Process to Develop Expedite Procedures.

Eschelon's principal argument is that Qwest and Eschelon did not "mutually develop" Version 30 to the Expedite Process. The facts show otherwise.

Version 30 to the Expedite Process was developed in CMP. ***Jill Martain Transcript at 333:23-334:15*** (in creating Version 30, followed CMP "to the letter"). Change Management is an industry wide process that every CLEC is entitled to join; it is not simply relegated to Qwest and Eschelon. *Id. at 326:8-15* ("As you know, Qwest and the CLEC community... use the change

management process to create and modify processes and systems that are used by CLECs. The ... CMP was created by the entire telecommunications industry as a result of 271, and it was approved by the FCC and this Commission. Qwest continues to file periodic reports with this Commission on the status of the CMP."). CMP is governed by a "Process Document" created in the Section 271 Process by the industry at large. ***Exhibit Q-3 (Martain Direct) at 5:23-6:8 & 7:14-8:6; Exhibit E-1, Attachment A-9 at 166-272*** ("Qwest Wholesale CMP Document"). This CMP Process Document defines, in great detail, the manner in which Qwest and the CLECs will jointly develop processes in CMP. *Id.* at §§ 5.3-5.9. The CMP Process Document defines the way in which CLECs, including Eschelon, can participate in the development of each process change during the CMP. *Id.* at §5.4.

The availability of CMP is central to this case because Eschelon was the most active CLEC in the CMP.

> Eschelon by far is the largest user of our CMP process. They routinely use the CMP to create processes to implement the terms of their Interconnection Agreement. They have attended 100 percent of the monthly meetings since April of 2001. Eschelon alone has submitted 19 percent of the total change requests that were accepted by Qwest. Of the 63 requests received to change a disposition of a Qwest notice Eschelon submitted 41 or 65 percent of those requests. For example, if a CLEC believes that a Level II notice that Qwest issues to document an undocumented existing process is really a change to a manual process, they can request that they change the level of disposition from a Level 2 to a Level 3 notice. They have submitted comments on approximately 50 percent of all of the e-mails that have been submitted to the CMP mailbox. They are a member of the Oversight Committee, which requires that their members have a comprehensive knowledge of CMP processes. They were the voice of the CLEC community providing readouts from the meeting that is held with the CLEC community the Monday before Qwest's CMP meeting. And they have routinely asked for and obtained changes to the process. Eschelon has submitted 228 change requests of which 188 have been implemented. It's obvious[] from ... how often Eschelon uses the CMP that it does so to implement the processes that will be used with the Interconnection Agreement.

Jill Martain Transcript at 327:1-328:4.

Eschelon used CMP to develop many processes and the "Expedite and Escalations Process" was no exception. Indeed, as stated above, the Eschelon ICA states that Qwest and Eschelon "shall mutually develop expedite procedures to be followed when" Eschelon wants to expedite an order. Eschelon and Qwest parties consistently used Change Management as the location where expedite procedures would be mutually developed:

> Q. (BY MR. STEESE) If either Qwest or Eschelon or any CLEC wants to change the terms of a PCAT, whether it be a minor, slight tweak or a significant change, the way that's done is by bringing a request to change to change management; true?
>
> A. ***Qwest requires us as CLECs to do that, though our existing interconnection agreement says a mutually developed process and it does not specify where that needs to happen. But yes, that is Qwest's requirement that we go through CMP.***

Bonnie Johnson Transcript at 31:23-32:20 (emphasis added). The interconnection agreement "provides the framework, and the processes created in CMP define exactly how Qwest and CLECs will implement the terms of their contracts." ***Jill Martain Transcript at 326:23-25.***

Qwest, Eschelon and the CLEC Community at large routinely took action to further develop the Expedites and Escalations Process. This development led to many different versions of the Process, each of which was developed, discussed and finalized in the CMP. The key modifications to the process are set forth below:

PCAT Version Number	Summary of Change
1	Documented the existing expedite process.
6	Level 2: Documented an existing process that, among other things, medical emergencies were an emergency condition under the Expedite Requiring Approval process.
11	Level 3 initiated by Covad: Created the Pre-Approved Expedite process. To utilize, must sign a contract amendment for $200 per day. Once you opt in, can no longer expedite an order for any product subject to the Pre-Approved Expedite process with the Expedites Requiring Approval process.
22	Level 3 initiated by Eschelon: Three new reasons were created for

	emergency expedites under the Expedite Requiring Approval process.
27	Level 3 initiated by Qwest: The Pre-Approved Expedite process was extended to 2w/4w Unbundled Loops. At this point, all design services were subject to the Pre-Approved Expedite process.
30	Level 3 initiated by Qwest: To obtain an expedited due date on any product subject to the Pre-Approved Expedite process, must sign a contract amendment and agree to pay $200 per day.
35	Level 3 initiated by AT&T: CLECs can expedite the Customer Not Ready standard interval of 3-days. When a due date is missed due to customer reasons, CLECs have the ability to expedite the standard 3-day interval.
41	Changed the process to include a noon cut-off for same day due date.

Exhibit Q3 (Martain Direct) at 19-22. This chart shows several things. First, the Expedite Process has changed many times, even after Version 30 went into effect. Ms. Martain testified that 18 different versions of the process existed. ***Jill Martain Transcript 387:10-21.*** Second, Eschelon recommended changes to the Expedite Process that were developed in CMP and went into effect (Version 22). *Id. at 330:21-331:5; 411:18-23.* Third, Qwest recommended changes that were developed in CMP and went into effect. Fourth, it is obvious that everyone in the telecommunications industry – Eschelon included – knows the CMP is where the Expedites and Escalations Process is mutually developed.

C. Eschelon Refused to Amend Its ICA to Include the Pre-Approved Expedite Process.

As mutual development of the Expedite Process evolved in the CMP, two distinct and separate processes were created to expedite service orders. Initially, Qwest used the emergency "Expedites Requiring Approval" process for all product types. This meant that a CLEC (including Eschelon) desiring to expedite a due date had to establish that the customer satisfied one of the delineated emergency conditions. Today, the list of emergency conditions is as follows:

- Fire
- Flood
- Medical emergency
- National emergency
- Conditions where your end-user is completely out of service (primary line)
- Disconnect in error by Qwest
- Requested service necessary for your end-user's grand opening event delayed for facilities or equipment reasons with a future RFS date
- Delayed orders with a future RFS date that meet any of the above described conditions
- National Security
- Business Classes of Service unable to dial 911 due to previous order activity
- Business Classes of Service where hunting, call forwarding or voice mail features are not working correctly due to previous order activity where the end-users business is being critically affected

Exhibit Q3 (Martain Direct) at 34-35.

The reason for the list was predictability. It ensured CLECs could predict whether Qwest would approve or reject a request to expedite an order within the 2-hour window set forth in the ICAs. ***Renee Albersheim Transcript at 284:20-286:14***. Section 3.2.2.13 of the Eschelon ICA set forth above gives Qwest the right to accept or reject a request to expedite an order "[w]ithin two (2) business hours after a request." The list let the CLECs know when Qwest would accept and when Qwest would reject a request for an expedite. ***Renee Albersheim Transcript at 284:20-286:14***. It is noteworthy that disconnects for Qwest caused errors is on the list. It is equally noteworthy that disconnects due to CLEC caused errors is not on the list. Indeed, disconnects due to CLEC caused errors is not on the list, has never been on the list, and has never been considered an emergency condition . ***Exhibit Q-3 (Martain Direct) at 28:3-39; Bonnie Johnson Transcript at 43:23-44:8 & 97:19-20.***

In February 2004, Covad asked to modify the emergency Expedites Requiring Approval process so CLECs could obtain an expedited due date for any reason. ***Bonnie Johnson at 43:19-22; Renee Albersheim at 203:4-11; Jill Martain at 328:19-329:23.*** A specific concern identified

by Covad was a desire to be able to obtain an expedited due date when a customer was disconnected due to CLEC caused reasons. ***Bonnie Johnson Transcript at 43:21-44:8; Jill Martain Transcript at 328:19-329:23.*** Covad's request to further develop the expedite process spawned the "Pre-Approved Expedite" process, which only applies to specified listed products. Covad and others were willing to pay a fee – a $200 per day fee – for the right to be able to get expedites for any reason. ***Jill Martain Transcript at 328:19-329:23***. In order to qualify for the new process, CLECs were required to sign a contract amendment. *Id.* ***See also Bonnie Johnson Transcript at 44:14-17.*** Once the amendment was signed, it was well known that the old emergency process was no longer available to the CLEC who opted in for any product on the Pre-Approved Expedites process list. Eschelon acknowledged this critical fact:

> Q. But the only way you could take advantage of the preapproved expedite process was if you signed an amendment. I think you said that in your summary.
> A. That's what Qwest required, yes.
> Q. And once you signed that amendment, any service that was delineated in the preapproved expedite process was subject to the $200 per day charge; correct?
> A. That's correct. It was -- that product was no longer eligible for the emergency requiring approval process.
> Q. Now, let's make sure that we're on the same page here, and let's assume that you work at Company ABC, not Eschelon –
> A. Uh-huh.
> Q. -- and you have signed this amendment. And your customer goes down, not a Qwest caused problem, and they have a true medical emergency in this location. Despite the fact that they have a medical emergency, because they signed the amendment they are subject to the $200 per day expedite for that unbundled loop; true?
> A. That is true. … -- once you signed that amendment, you could no longer get emergency expedites, even if the condition existed, for the products that were on the preapproved list.

Bonnie Johnson Transcript at 44:18-45:13. No one disputed or challenged the implementation of this new process. Many CLECs, including Covad and McLeod, opted into the new process and signed the requisite contract amendment. ***Jill Martain Transcript at 408:23-409:15.*** Eschelon, however, continued to use the status quo – the Expedites Requiring Approval process

for all products. If none of the stated emergency conditions existed, Eschelon could not get an expedited due date.

On September 12, 2005, Qwest proposed a change to the Expedite Process in Change Management. Qwest proposed that 2-wire and 4-wire loops would become a part of the Pre-Approved Expedites process. ***Jill Martain Transcript at 332:11-18.*** This change was done so that all design services would be subject to the Pre-Approved Expedites process, and all POTS services would be subject to the emergency Expedites Requiring Approval process. *Id. at 332:11-333:2.* The only party who filed comments about the proposed change was Eschelon, and they "acknowledge[ed] that the two-wire/four-wire would be included, and they were inquiring about the rate." *Id. at 333:20-22.* Qwest responded, completing the development process in CMP, and Version 27 went into effect. Once Version 27 took effect, everyone who had signed an amendment to partake of the Pre-Approved Expedite process (a) could obtain an expedited due date on any design service – which includes any unbundled loop – for $200 per day, and (b) the emergency conditions process was no longer available for any CLEC who signed such an amendment for any design services. ***Jill Martain Transcript at 408:22-409:15*** (Version 30 had no impact on CLECs who had already opted into the Pre-Approved Expedites process because they had already bound themselves to the $200/day fee). On the other hand, CLECs who did not sign the amendment to partake in the Pre-Approved Expedite Process (such as Eschelon) remained subject to the emergency Expedites Requiring Approval process for all products. ***Jill Martain Transcript at 361:23-362:3.***

The situation of having two different classes of CLECs created a quandary for Qwest. First, CLECs like Covad and McLeod who opted into the Pre-Approved Expedite process paid $200 per day for expedites even if emergency conditions existed. ***Jill Martain Transcript at***

408:22-409:15. Second, CLECs like Eschelon who had not opted into the newly developed process could get expedites on all services at no charge – including unbundled loops – under the emergency Expedites Requiring Approval process. *Id. at 329:20-330:13.* Qwest had also transitioned all of its retail customers, wholesale customers, and interexchange carrier customers to the Pre-Approved Expedite Process. *Id. at 330:13-19.* The two different processes created the potential for foul play and claims of discrimination. *Id. at 330:7-332:20.* Qwest's concerns came to fruition. Various CLECs were caught red-handed abusing the emergency conditions process, for example using the same doctor's excuse over and over again to justify a purported "medical emergency." ***Id. at 400:9-402:24; Exhibit Q-3 (Martain Direct) at 24:15-25:11.***

Given that some CLECs were cheating, Qwest determined it should level the playing field, eliminate the disparity and treat all customers – CLECs, IXCs, wholesale carriers and retail customers – identically. ***Jill Martain Transcript at 332:17-333:1***. Before proposing a change that all CLECs be subject to the Pre-Approved Expedite Process, Qwest conducted an investigation to ensure that it would not conflict with any interconnection agreement. *Id. at 333:2-6.* Qwest looked at the ICAs in Arizona, and specifically looked at the Eschelon ICA to make sure an amendment requiring payment of $200 per day was consistent with the ICAs. Qwest legal counsel undertook this review. *Id. at 333:7-10.* The review found that payment of $200 per day did not conflict with any ICAs, and specifically did not conflict with the Eschelon ICA. *Id. at 340:17-341:5 & 349:3-8 & 383:3-21.*

As a result, on October 19, 2005, Qwest proposed Version 30 to the Expedite Process for consideration and development in CMP. ***Exhibit Q-4 (Martain Rebuttal) at Attachment JM-R7.*** Version 30 did nothing more than to state all parties would be subject to the Pre-Approved Expedites process for all design services, including unbundled loops. If CLECs wanted to get an

order expedited for those products, Qwest required language in the ICAs agreeing to pay the $200 per day fee. The entire purpose of the amendment was to ensure parties agreed to the fee.

> Q. ... That the list by Version 27, the list of products in the preapproved expedite process were the group of design services, and the group of products left for expedites requiring approval were the non-design or POTS services; correct? Isn't that your understanding?
> A. Yes.
> Q. Okay. And so basically what Version 30 did was say, Eschelon, if you want us to -- and this could be any CLEC name. I'm not trying to say specific to Eschelon. Eschelon, if you want us to expedite as a design service for you, you have to agree to pay a $200 per day fee. That's what the essence of Version 30; true?
> A. Yes.

Staff Transcript at 362:6-19.

Version 30 was proposed as a "Level 3" change to the Expedite Process. ***Exhibit Q-3 (Martain Direct) at 21-22; Staff Transcript at 546:23-25***. Per the Change Management Process Document, CLECs were given opportunities to participate in the development of this proposed change. According to the Process Document, as a Level 3 Change, the following process was used:

> **5.4.4 Level 3 changes**
> Level 3 changes are defined as changes that have moderate effect on CLEC operating procedures . . . .
>
> **5.4.4.1 Level 3 Process/Deliverables**
> For Level 3 changes, Qwest will provide a notice to CLECs. Level 3 notifications will state the disposition (e.g. level 3), description of change, proposed implementation date, and CLEC/Qwest comment cycle timeframes.
>
> ***
>
> Qwest will provide initial notice of Level 3 changes at least 31 calendar days prior to implementation and adhere to the following comment cycle:
>
> - CLECs have 15 calendar days following initial notification of the change to provide written comments on the notice
>
> - Qwest will reply to CLEC comments no later than 15 calendar days following the CLEC cutoff for comments. The Qwest reply will also include confirmation of the implementation date.
>
> ***

- Qwest will implement no sooner than 15 calendar days after providing the response to CLEC comments.

***

- CLEC comments must be provided during the comment cycle as outlined for Level 3 changes. Comments may be one of the following:
  - General comments regarding the change (e.g., clarification, request for modification)
  - Request to change disposition of Level. If the request is for a change to Level 4, the request must include substantive information to warrant a change in disposition (e.g. business need, financial impact).
  - Request for postponement of implementation date, or effective date

- If the CLECs do not accept Qwest's response, any CLEC may elect to escalate or pursue dispute resolution in accordance with the agreed upon CMP Escalation or Dispute Resolution

Exhibit E-1, Attachment A-9 at §5.4.4 (All of the language is quoted; however, not all details are included in order to save space).

Thus, as a Level 3 Change, CLECs including Eschelon had many rights to challenge or otherwise impact Version 30. Eschelon (and other CLECs) did file comments. Eschelon also requested an "ad hoc" call to discuss the proposed change. ***Jill Martain Transcript at 334:6-12.*** The call was held and Jill Martain of Qwest explained the proposed change. *Id. at 367:2-10.* After the call, no one raised any additional issues; no one asked to change implementation; no one sought escalation; no one sought postponement; no one sought dispute resolution. *Id. at 335:44-336:2.* ***Most importantly, Eschelon never claimed that the proposed change violated the terms of the ICA.*** *Id. at 407:13-16; 408:5-8 & 413:13-17.* Given that no one raised any additional issues with Version 30 in CMP, Qwest concluded that development of the process was complete, and implemented the process. Qwest, however, did extend the time to implement Version 30 from the standard 15 day interval, to two and one-half months, or until January 3, 2006 to give CLECs additional time. *Id. at 334:2-5*

Eschelon is the poster child for why Version 30 is necessary. Qwest specifically demanded an amendment to interconnection agreements to ensure that CLECs, such as Eschelon, would pay the expedite charges. "One position constantly taken by Eschelon is that they would not pay any fee that was not set forth in Exhibit A to their Interconnection Agreement or approved by a state cost docket." ***Jean Novak Transcript at 428:9-13***. Eschelon's position "led to outstanding payments of over $3 million." *Id. at 428:14-15.*

D. Eschelon First Raised an Argument that Version 30 Conflicted with Their ICA When they Filed this Action Complaining that Qwest did not Expedite an Order for a DS1 capable Loop for the Rehabilitation Center.

On the very day Version 30 went into effect – January 3, 2006 – Eschelon asked Qwest to expedite a due date for an unbundled loop using the old emergency Expedites Requiring Approval process. ***Jean Novak Trancript at 428:21-24***. The request was rejected because Eschelon had not agreed to pay $200/day to expedite such orders. This same scenario occurred on several different occasions in January and February 2006. Jean Novak, Eschelon's Account Manager, had "many discussions" with Eschelon about the new expedite process and there was "never any confusion about the expedite process." *Id. at 428:19-429:4.* Despite all of these conversations, Eschelon refused to adapt to the amended expedite process developed in Change Management. Moreover, even while all of this was occurring, Eschelon never claimed that Version 30 violated their ICA.

On March 8, 2007, Qwest received a request to disconnect a DS1 Capable Loop serving the Rehabilitation Center in Mesa, Arizona. The Rehabilitation Center serves 3,000 people with disabilities and gives them jobs. ***Jean Novak Transcript at 429:7-10.*** They had several phone lines into the facility including business lines and a separate DS1 Capable Loop (otherwise known as a "T1") that was broken down into individual lines for each room. *Id. at 429:11-14.*

Qwest disconnected the loop as requested; however, it ended up that Eschelon had made a mistake and asked Qwest to disconnect the wrong loop. Eschelon used the facts surrounding the Rehabilitation Center as representative of why it was harmed by Qwest requiring use of the Pre-Approved Expedite Process. *See generally Eschelon's Complaint.* In reality, the facts surrounding the Rehabilitation Center highlight why the Pre-Approved Expedite Process made available in Versions 11 and 27, and mandated in Version 30 provides additional benefits to the CLECs, including Eschelon.

The facts concerning what occurred at the Rehabilitation Center are undisputed. Indeed, Eschelon has acknowledged that the disconnect occurred due to its own error. Specifically:

- On March 8, 2006, Qwest received an order from Eschelon to disconnect the DS1 Capable Unbundled Loop (otherwise known as a T1) serving the Rehabilitation Center's clients' individual rooms. Qwest confirmed to Eschelon that Qwest had received the Eschelon order and confirmed that Qwest would disconnect the line on March 15 as requested. Qwest sent the confirmation to Eschelon twice.

- On March 15, Qwest disconnected the loop on schedule as requested.

- Eschelon contacted Qwest and asked that the line be repaired not knowing that another department within Eschelon had issued a disconnect order. However, issuing a repair ticket against a disconnected service is an improper process. Thus, the disconnect went through as scheduled. 446:4-448:14 (back in service until the balance of the disconnect order was completed; then remainder of disconnect occurred in the ordinary course); 478:17-479:14. On this point, Eschelon acknowledges that the process worked as it should have. ***Bonnie Johnson Transcript at 48:13-18 & 68:18-69:25.***

- Thus, the Rehabilitation Center lost the DS1 portion of its service on March 15, due to Eschelon's own error. Eschelon acknowledges as much. ***Bonnie Johnson Transcript at 48:13-18 & 68:18-69:25.***

- On March 16, Eschelon submitted a new order for a DS1 Capable Unbundled Loop – the wholesale equivalent of a T1. The order did not request an expedited due date.

- On Friday, March 17, 2006 at 12:38 p. m., Eschelon called and asked that the order be expedited no later than Monday, March 20, 2006.

- One hour later, Qwest denied the expedite request because Eschelon did not meet the criteria for expediting an order for an Unbundled Loop, which requires a signed agreement. It also did not meet the criteria of a medical emergency.

- Over the weekend, Qwest worked with Eschelon, Eschelon ordered a DS1 private line from Qwest's tariffs (the retail equivalent of a DS1 Capable Loop), and Qwest charged Eschelon $1800 to expedite the order ($200 per day as expressly set forth in the tariff).

- Qwest got the DS1 private line up and operational the afternoon of March 20, 2006 – the very day requested by Eschelon.

Jean Novak, Transcript at 429:19-431:6.

Echelon and Staff argue that the DS1 Capable Loop would have been expedited for the Rehabilitation Center using the emergency Expedites Requiring Approval Process. Specifically, Staff argues that an expedite would have been accepted because (1) the Rehabilitation Center's primary line was completely out of service; and (2) the order could be classified as a medical emergency. ***Exhibit S-1 (Staff Direct Testimony) at 25:21-25.***

The facts, however, show otherwise. The Rehabilitation Center would not have been eligible for an expedite under the old process. ***Jean Novak, Transcript at 432:17-22.*** During the time the Rehabilitation Center's T-1 was out of service, it is undisputed the Center had telephone service with the primary lines into the business. ***Jean Novak, Transcript at 431:17-22.*** Indeed, during the time the T1 was down, the Rehabilitation Center was able to use their primary service, call 911, and get medical care. *Id.* It is also undisputed that the Rehabilitation Center has no greater need for 911 service than any typical business. *Id. at 432:3-8.* In a futile attempt to try and counter these facts, Eschelon cites to a letter on the Rehabilitation Center's letterhead. ***Bonnie Johnson Transcript at 48:13-49:24.*** However, Eschelon requested the letter, and actually drafted the memo. ***Exhibit Q-6 (Novak Rebuttal) at 3.*** Eschelon has no evidence to the contrary. ***Bonnie Johnson Transcript at 48:13-49:24.*** Indeed, the Center also

specifically informed Qwest there was no medical emergency. ***Jean Novak, Transcript at 450:17-23***. Finally, Eschelon never informed the Rehabilitation Center that it could request and obtain an expedited order for a separate fee. ***Jean Novak, Transcript at 432:9-16***. The Center specifically stated that this is a fact they would have liked to have known. *Id.*

Thus, Eschelon had no one to blame but itself for the situation, and, Eschelon's decision to order a retail circuit with a $200 per day expedite fee was the only way for Eschelon to resolve the problem it had created.

E. Qwest's Rate of $200 Per Day to Expedite Orders for Unbundled Loops is Consistent with Industry Practice.

Eschelon also takes issue with the $200 per day rate that Qwest charges to expedite an unbundled loop order using the Pre-Approved Expedite process. This rate is not a TELRIC rate, but a market rate. Qwest applies a market rate for several reasons, including that a request to expedite is a request to "leapfrog" to the front of the queue. ***Terry Million Transcript at 494:2-12.*** Just like Federal Express overnight deliveries or front row concert tickets, a request to expedite an order has inherent value. *Id.* at 495:10-496:5.

Qwest is not the only telecommunications company in the industry to have a special charge for expedites; many others do as well. For example, AT&T charges $675, Verizon charges between $500 and $1500, and BellSouth has the exact same charge of $200 per day. ***Terry Million Transcript at 497:12-23 & 529:23-25***. Moreover:

> CLECs charge for expedites, too. When they provide services to other CLECs or to other participants in the industry, they charge expedites. And the prices that I found for expedites from the CLECs range from $250 to $500. So it's not only Qwest that believes that expedites constitute a superior service or provide a value that's worth paying for. It's other members of the carrier industry as well.

Id. at 497:24-498:6.

Many other CLECs have opted into Version 30 of the Expedite Process. Qwest is not aware of any CLEC complaining about the $200/day rate except for Eschelon. ***Exhibit Q-1 (Albersheim Direct) at 9:13-21***. Given that others have agreed to pay this rate, and others in the industry have similar rates, there are no facts to suggest the rate is unreasonable. Despite that, Eschelon asks the Commission to hold Qwest to the outdated process so it can continue to get expedites for design services (including unbundled loops) at no additional charge. At a minimum, Eschelon asks that the Commission impose TELRIC rates for expedites. Irrespective of whether expedites are provided for free or at TELRIC rates, it would provide Eschelon with a competitive advantage. ***Terry Million Transcript at 531:23-532:15***. TELRIC is not supposed to create a situation where it provides one competitor with an advantage. *Id.* at 532:16-19. Qwest does not believe that it, its retail customers, its wholesale customers, or its CLEC customers who have opted into the Pre-Approved Expedite process would be able to effectively compete if Eschelon is given this competitive advantage.

III. ARGUMENT

A. Eschelon Has Withdrawn its Claim that Qwest's Expedite Process Discriminates Against CLECs.

Eschelon's Complaint raised two causes of action: (1) breach of contract, and (2) illegal discrimination. As to the second claim, Eschelon alleged that Qwest's process for expediting service orders discriminated against CLECs who ordered unbundled loops. See, e.g., Complaint at ¶21. Eschelon has since dropped this allegation. Qwest proved that it had one process – the emergency "Expedites Requiring Approval" Process – for POTS services, and uniformly applied the process to retail and wholesale customers alike. Qwest also proved that it utilized a separate process – the "Pre-Approved Expedites" Process – for design services, and uniformly applied that process to retail and wholesale customers alike.

There is substantial justification for utilization of one process for design services and a separate process for POTS services. The two categories of products contrast qualitatively: they are substantially different in the amount and nature of work required, Qwest's processes for ordering and provisioning "non-design services" differs substantially from its processes for ordering and provisioning "design services." This is well-known, and supported by many commission decisions. *See e.g., In re Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York,* 15 FCC Rcd 3953, FCC 99-404, ¶44 (Rel. Dec. 22. 1999) (regarding different standards to show nondiscrimination, for services that have an analogue versus those that do not have an analogue); *In Re U. S. WEST Communications, Inc.,* 2002 WL 1378630, Decision No. 64836 ¶6 (Ariz. Corp. Comm. May 21, 2002); ("In the Bell Atlantic New York Order the FCC stated that the ordering and provisioning of network elements has no retail analogue..."). The Staff recognized these distinctions and, as a result, found that Qwest did not discriminate. ***Exhibit S-1 (Staff Direct) at 32:19-33:11.*** This led Eschelon to back off of this allegation, and focus all of its attention on the breach of contract claim. Indeed, Eschelon did not spend one moment at hearing trying to prove that Qwest discriminates. The Commission should therefore summarily dismiss this claim.

B. <u>The Overwhelming Evidence Shows Qwest's Pre-Approved Expedite Process is Perfectly Consistent with Eschelon's ICA; In Other Words, Qwest Did Not Breach Any Term of Eschelon's ICA by Developing a Modified Process for Expediting Design Services Orders in Change Management.</u>

It is very important when analyzing this case to acknowledge that it comes to the Commission in the form of a formal complaint. It is not an arbitration of an interconnection agreement under 47 U.S.C. § 252. It is also not a generic docket that applies to the telecommunications industry as a whole. Like any garden variety breach of contract case,

Eschelon – the complaining party – must prove that Qwest breached terms of its ICA, and that Qwest's breach caused Eschelon damage. *Correa v. Pecos Valley Dev. Corp.*, 126 Ariz. 601, 605 (Ariz. Ct. App. 1980) (citing *Clark v. Compania Ganadera De Cananea, S. A.*, 95 Ariz. 90, 94 (Ariz. 1963)).

The only contract at issue in this case is the Eschelon ICA. No party submitted evidence about any other ICAs. ***See, e.g, Bonnie Johnson Transcript at 23:15-24:24.*** Neither Staff nor Eschelon reviewed Qwest's ICAs with other parties, evaluated their terms, or otherwise contacted CLECs to determine whether the Pre-Approved Expedite Process violated their ICA. ***See, e.g., Staff Transcript at 550:1-7.***

There are a plethora of cases in Arizona that discuss contract claims, and the standards that apply to contract claims. The law is plain, easy to understand, and unequivocal. When traditional contract law is overlaid on this case, the decision is simple: Qwest did not breach Eschelon's ICA by developing and implementing the Pre-Approved Expedites Process for design services (such as unbundled loops) in Change Management. Indeed, this process is perfectly consistent with the terms of Eschelon's ICA.

1. The Pre-Approved Expedite Process Developed in Change Management Complies with the Plain Language of Eschelon's ICA.

Unambiguous, express terms of contracts are to be enforced, because they are the parties' intent. *Apolito v. Johnson*, 414 P.2d 442, 444 (Ariz. App. 1966) (noting the "sanctity of written contracts, defining the rights and duties of the contracting parties..."). The Commsision cannot interpret a contract in a manner that will deny a party an express right set forth in the contract. *Grubb & Ellis Mgmt. Servs., Inc. v. 407417 B.C., L.L.C.*, 213 Ariz. 83, 86 (Ariz. Ct. App. 2006) ("A general principle of contract law is that when parties bind themselves by a lawful contract

the terms of which are clear and unambiguous, a court must give effect to the contract as written.").

The specific contract provisions at issue in this case are not in dispute. The provisions all come from Attachment 5 to the Eschelon ICA, which is titled "BUSINESS PROCESS REQUIREMENTS." Section 3, entitled "Ordering and Provisioning" has specific sections on expedites; specifically:

> 3.2.2.12 Expedite Process: U S WEST and CO-PROVIDER shall mutually develop expedite procedures to be followed when CO-PROVIDER determines an expedite is required to meet subscriber service needs.
>
> 3.2.2.13 Expedites: U S WEST shall provide CO-PROVIDER the capability to expedite a service order. Within two (2) business hours after a request from CO-PROVIDER for an expedited order, U S WEST shall notify CO-PROVIDER of U S WEST's confirmation to complete, or not complete, the order within the expedited interval.

Exhibit C-1. In addition, Attachment 5, section 3.2.4 contains three separate provisions each of which states that "expedite charges may apply" when Qwest accelerates a due date for Eschelon.

Thus, the plain language of the Eschelon ICA contains the following requirements:

- Qwest and Eschelon shall "mutually develop" an expedite procedure;
- The procedure must include the "capability to expedite a service order";
- The procedure must ensure that Qwest will confirm whether it will or will not expedite an order within two business hours; and,
- The procedure cannot deny Qwest the ability to obtain payments altogether; as expedite charges "may" apply.

The Pre-Approved Expedite Process at issue in this case satisfies each of these criteria.

The entire focus of the dispute is on the term "mutually develop." Eschelon admits that the place where processes are mutually developed is in the Change Management Process.

Q. And that is any time either Qwest or a CLEC wants to change a product catalog or a process, they're required to bring that requested change to change management for some kind of discussion?

MR. MERZ: Object to the question as compound.

***

Q. (BY MR. STEESE) If either Qwest or Eschelon or any CLEC wants to change the terms of a PCAT, whether it be a minor, slight tweak or a significant change, the way that's done is by bringing a request to change to change management; true?

A. ***Qwest requires us as CLECs to do that, though our existing interconnection agreement says a mutually developed process and it does not specify where that needs to happen. But yes, that is Qwest's requirement that we go through CMP.***

Bonnie Johnson Transcript at 31:23-32:20 (emphasis added). Thus, Eschelon expressly recognized that mutual development could theoretically occur in many ways, but that Qwest required that it occur in Change Management.

Ms. Bonnie Johnson emphasized this point in her live testimony:

Q. [O]ne way that a PCAT can be developed is through Level 1 through Level 4 notifications in change management?

A. One way, yes, sometimes. And sometimes those level of notices don't result in a change to the PCAT.

***

Q. ... [W]hen you look at the way change management works, no matter what the level is, notice is given; correct?

A. Uh-huh.

Q. Is that a yes? You said uh-huh. I'm assuming that's yes.

A. Yes. Okay.

Q. And that there's an opportunity for the CLEC, once they get this information, to request a change in level, for example, because you or some other CLEC might think that the requested change doesn't meet the criteria of a Level 2 or 1, or whatever it was, change; true?

A. That is true. That's a different question, but yes, that is true.

***

Q. And so each and every requested change by Qwest or by a CLEC, everyone has the opportunity to comment on it and provide input in some way?

A. We have the opportunity to comment, sometimes provide input. The end result is that we can't stop it if Qwest chooses to implement it.

Bonnie Johnson Transcript at 36:10-38:1.

By definition, processes implemented in Change Management are "mutually developed." ***See, e.g., Jill Martain Transcript at 336:3-6 & 336:18-23.*** The word "developed" means "to make visible or manifest, to work out the possibilities of, to create or produce, especially by deliberate effort over time, to cause to unfold gradually." ***Renee Albersheim Transcript at 189:25-190:4*** (quoting *Merriam-Webster's*). Each version of the expedite process was documented, commented upon, and created over time using a defined process. In other words, it was "developed." If a proposed process change is initiated by a CLEC; Qwest got notice and the ability to comment. If a proposed change is initiated by Qwest, CLECs (and Eschelon specifically) also got notice and the ability to comment. Eschelon participated in "100%" of the CMP meetings. ***Jill Martain Transcript at 327:1-328:4.*** Given that Eschelon and Qwest always participated, the expedite processes were always mutually developed.

This did not just occur with the Expedite Process. Qwest and Eschelon went to CMP every time the word "develop" was used in the ICA. Eschelon and Qwest routinely developed processes in the Change Management Process. For example:

1. Eschelon's ICA required the parties to "develop" process for 911 database integrity. ***Exhibit Q-24, §42.2.7.*** Eschelon used CMP to develop a process for 911 database integrity. ***Exhibit Q-20. See generally Bonnie Johnson Transcript at 56:16-58:8.***

2. Eschelon's ICA required the parties to "develop" process for local number portability. ***Exhibit Q-24, §1.1.51.*** Eschelon used CMP to develop processes for LNP. ***Exhibit Q-21. See generally Bonnie Johnson Transcript at 58:9-60:14.***

3. Eschelon's ICA required the parties to "develop" processes to implement ANSI standards. ***Exhibit Q-23***. Eschelon used CMP to develop a process for ANSI standards. ***Exhibit Q-22. See generally Bonnie Johnson Transcript at 61:15-63:13***. Specifically:

> Q. These three examples show that the extent that Eschelon wants a particular ANSI standard or a standard for provisioning utilized by Qwest, that can be brought to change management; true?
>
> A. My response will be the same. It doesn't indicate in Q-23 where it says the parties will develop. And yes, Eschelon submitted this change request because that's what we're required to – that's what Qwest requires us to do to get a change.
>
> Q. So again, practically speaking, the way one gets adherence to ANSI or a deviation from ANSI, it is in change management?
>
> A. Qwest requires us, for any changes to go through change management

Id.

These examples show the parties not only understood that CMP was the place to "develop" processes, but actually used CMP to "develop" processes and procedures that the parties used to implement the terms of the parties' ICA.

Eschelon challenges the "Pre-Approved Expedite Process" created in Change Management, and claims it breaches the ICA even though it was "developed" in CMP. Indeed, Eschelon claims that Version 30 breaches their ICA even though:

- Qwest followed the Change Management Process "to the letter" in developing and implementing Version 30. ***Jill Martain Transcript at 333:23-334:15***;

- Eschelon admits it participated in every aspect of the development of Version 30. ***Bonnie Johnson Transcript 52:12-54:7*** (admits Eschelon is "very, very active" in CMP);
- Eschelon participated in the development of every version of the Expedite Process in CMP. ***Jill Martain Transcript at 327:1-328:4;*** and,
- Eschelon never informed Qwest during the CMP (indeed, until immediately before filing this complaint in April 2006) that Version 30 violated the terms of its ICA. *Id. at 407:13-16; 408:5-8 & 413:13-17.*

Despite all this, Eschelon argues that Version 30 was implemented over its objection and therefore, it was not "mutually developed." Eschelon's witnesses interpret the phrase "mutually develop" as "mutually develop and agree." Indeed, Eschelon's witness used this verbiage in stating why the Pre-Approved Expedites Process conflicted with the ICA:

> Q. I'm still trying to get to an understanding of what Eschelon's position is. You said that the parties can continually revise the process through mutual agreement; true?
>
> A. That is our position. That's the essence of our position.

Doug Denney Transcript at 132:3-133:12.

Thus, Eschelon erroneously claims breach of contract by inserting a word – the word "agree" – into Attachment 5, §3.2.2.12 of the parties' ICA. In other words, Eschelon asks the Commission to interpret the ICA, not according to its plain meaning, but by adding the word "agree." It is contrary to traditional contract interpretation to add language to an already clear, written contract provision: "[t]he object of all rules of interpretation is to arrive at the intention of the parties ***as expressed in the contract.***" *RAJI (Civil) 4th Contract* 26 n.1 (emphasis added, quoting *United Cal. Bank v. Prudential Ins. Co.,* 140 Ariz. 238, 261, 681 P.2d 390, 413 (Ct. App. 1983)); *Grubb & Ellis Mgmt. Servs.*, 213 Ariz. at 86 (court must enforce contract as written).

"[P]romises should not be found by process of implication if they would be inconsistent with express provisions that there is no reason to set aside or to hold inoperative." 6-25 Corbin on Contracts §564. "When the language of a contract is clear and unambiguous, effect must be given to its terms, and the court, under the guise of constructions, cannot reject what the parties inserted or insert what the parties elected to omit." *DeLoach v. Lorillard Tobacco Co.*, 391 F.3d 551, 558 (4th Cir. 2004) (internal quotation marks omitted). *See, e.g., Omni Quartz v. CVS Corp.*, 287 F.3d 61, 64-65 (2d Cir. 2002) (trial court correctly enforced express language of contract; "[w]hatever Omni's greater hopes or expectations may have been, they were not part of the parties' ultimate agreement.").

It is especially true in this case that inserting the word "agree" where the parties omitted it in §3.2.2.12 would be error. First, the contract contains an integration clause stating that the contract can only be amended by the parties in writing. ***Exhibit C-1 at §53.1***. Asking the Commission to amend the ICA to add the word "agree" in this section would directly contradict the integration clause.

Secondly, to interpret this provision of the ICA, the tribunal must take it in the context of the whole agreement:

> We interpret contracts to give effect to all their parts. .... When interpreting a contract . . . it is fundamental that a court attempt to ascertain and give effect to the intention of the parties at the time the contract was made if at all possible.

Hanson v. Tempe Life Care Vill., Inc., 162 P.3d 665, 666-667 (Ariz. Ct. App. 2007) (internal quotation marks omitted; citing *inter alia, Kintner v. Wolfe*, 102 Ariz. 164, 168, 426 P.2d 798, 802 (1967)). The parties used the word "agree" to add substantive requirements in at least 82 other provisions of the ICA. ***Renee Albersheim Direct at 188:8-0189:23.*** This shows that the absence of the word "agree" in Section 3.2.2.12 – i.e., the absence of an agreement to further

agree later – was the parties' intentional omission from that provision. It is a logical truth, that where a contract plainly uses a specific word or phrase (such as that the parties will "develop and agree" versus, the parties will develop"), the absence of that phrase in another provision shows the parties' intent to omit it as to that provision. *See, e.g., In re Hoffman Bros. Packing Co.,* 173 B.R. 177, 184 (Bankr. Fed. App. 1994) (in interpreting union's agreement with employer, "[t]he union should be bound not only by the language it chose to use but also by what it chose to omit," citing *KCW Furniture, Inc. v. NLRB,* 634 F.2d 436 (9th Cir. 1980)). *Cf. Western Vegetable Oils Co. v. Southern Cotton Oil Co.*, 141 F.2d 235, 237 (9th Cir. 1944) ("Except for the omission of this language, the sales contract throughout follows closely the uniform general contract embodied in the rules - so closely, in fact, as to produce the conviction that the draftsman had the Institute form before him. This apparently deliberate omission of the express provision for arbitration, which the framers of the rules were careful to incorporate into the cognate clause of their uniform contracts, is persuasive evidence of an intention to abrogate the arbitration rule."). ***Taken in the context of the rest of the ICA, the absence of the word "agree" in this section shows the parties intended that omission.***

Given standard contract law, the recognition that the parties uniformly went to CMP to "develop" processes, and that Qwest and Eschelon worked together in the creation of Version 30 in CMP, it is essentially impossible to find that the creation of Version 30 breached the ICA.

2. Staff's Position on Breach of Contract Was Rejected by Both Parties.

Staff's position is slightly different from both Qwest and Eschelon. Staff claims that under the ICA, Qwest is wedded to the Expedite Process in effect at the time Qwest and Eschelon entered into the ICA. As a result, Staff claim Qwest is bound to offer expedites on

unbundled loops for free even though the language in the ICA gives Qwest the right to charge for expedites. Staff is wrong on every single point is raises.

First, the Staff concludes that Qwest violated the ICA by utilizing an Expedite Process that is different from the process in place when Eschelon executed the ICA:

> Q. Now, if I'm hearing you correctly -- and please tell me if I'm wrong, and this is the way I read your testimony and the way I heard your summary – that whatever process was in place for expedites at the time Eschelon opted into the AT&T interconnection agreement is the process Qwest is wedded to follow for the duration of that contract. Is that your view?
>
> A. Yes, it is.
>
> ***
>
> Q. Your opinions as to whether a breach occurred are all premised on the fact that, in your opinion, the process that was in place when the contract was executed is the process Qwest must follow?...
>
> A. ...Yes, it is, until negotiations are commenced for a change to the contract.

Staff Transcript at 554:15-22; 555: 15-21. This position is also contrary to the viewpoint of both Qwest and Eschelon. Both parties testified that the ICA allowed the Expedite Process to change. Indeed, Eschelon went to CMP and requested a modification to the Expedites process that became Version 22. Eschelon agrees that this process was mutually "developed" and became a part of the ICA and Staff does not agree. Qwest agrees that this process was mutually developed because the development occurred in CMP.[1] Thus, Staff is advocating an interpretation of the ICA that conflicts with the parties' common interpretation. This is inappropriate. "It is the intent of the parties at the time the contract was made which is

[1] Eschelon tries to pass this off as documenting an undocumented process and not a true change in process. This is faulty and Eschelon knows it. Documenting an undocumented process is a Level 2 change. Version 22 went through as a Level 3 Change, meaning adding changes to a process that have moderate effect on CLEC operating procedures. Thus, by definition, Eschelon added to, modified and enhanced the Expedites process in Change Management. This is additional evidence that the parties used CMP to mutually develop the expedite process.

controlling." *RAJI (Civil) 4th* Contract 26 n.1 (citing *Polk v. Koerner,* 111 Ariz. 493, 533 P.2d 660 (1975)).

On this point, however, the Staff's testimony is inconsistent with its recommendations. Staff claims Qwest should revert back to Version 11 of the Expedite Process, and provide all CLECs in Arizona with this version. ***Exhibit S-1 at 39:7-15.*** However, Version 11 came into existence four years after the parties executed the ICA. These positions are irreconcilable. ***Exhibit Q-3 (Martain Rebuttal) at 1:19-2:9.***

3. Eschelon and Staff's Position that Qwest Cannot Charge For Expedites Even Though the ICA Allows Such Charges is Contrary to Law.

Eschelon and Staff both claim that because Qwest expedited orders for unbundled loops at no charge in the past, it was contractually obligated to continue to do so at no charge until the ICA was amended. Staff readily acknowledged that all Version 30 did was to ensure CLECs knew when Qwest would charge for an expedite; and that unless Eschelon agreed to pay $200 per day, it would reject the expedite. ***Staff Transcript at 564:19-565:16***. In other words, Staff and Eschelon both claim that Qwest is prohibited from charging for expedited orders for unbundled loops – even though the ICA says on three separate occasions that Qwest "may" charge – because Qwest had never charged for such expedites in the past.

This position is contrary to the law on the subject. A parties' course of performance can never be used to eviscerate a contract term. *Restatement (2nd) of Contracts* § 203(b).[2] *See also New Jersey v. New York,* 523 U.S. 767, 832 (1998) (J. Scalia, dissenting) (citing as 'hornbook' contracts law, Section 203(b)); *Hall v. Schulte,* 172 Ariz. 279, 283 (Ariz. App. 1992) (citing

[2] "In the interpretation of a promise or agreement or a term thereof, the following standards of preference are generally applicable: * * * (b) express terms are given greater weight than course of performance, course of dealing, and usage of trade, course of performance is given greater weight than course of dealing or usage of trade, and course of dealing is given greater weight than usage of trade." *Restatement (2nd) of Contracts* § 203(b). Arizona courts expressly follow the restatement unless an express decision states to the contrary.

Restatement Section 203(a) with approval). It is undeniable the parties' ICA states Qwest "may" charge Eschelon when it expedites an order. It is improper as a matter of law to find that course of performance or course of dealing negates Qwest's ability to take advantage of the plain language of those three contractual provisions.

The position taken by Staff and Eschelon is also tantamount to stating that Qwest's course of performance waives its express rights under the ICA to get paid for expediting an order. The ICA deals with this issue directly. Section 34 states:

> 34. Waivers
>
> 34.1 No waiver of any provisions of this Agreement and no consent to any default under this Agreement shall be effective unless the same shall be in writing and properly executed by or on behalf of the Party against whom such waiver or consent is claimed.
>
> 34.2 ***No course of dealing or failure of either Party to strictly enforce any term, right, or condition of this Agreement in any instance shall be construed as a general waiver or relinquishment of such term, right or condition.***

Exhibit C-1 at § 34 (emphasis added). In general, non-waiver clauses, such as that found in section 34, are fully enforceable. *See, e.g., Burke v. Voicestream Wireless Corp. II,* 207 Ariz. 393, 398 (Ariz. Ct. App. 2004); *SEC v. Lincoln Thrift Assoc.*, 557 F.2d 1274, 1279 (9th Cir. 1977) (clear error where trial court found waiver of right under the lease, in large part because the lease contained a non-waiver clause). As stated by the Arizona Court of Appeals:

> Even though Voicestream and SWC presented evidence that the homeowners in Desert Estates have acquiesced in prior violations of section 4, ***we have not been presented any persuasive reason why the non-waiver provision of the Restrictions should not be enforced in this instance.*** Unambiguous provisions in restrictive covenants will generally be enforced according to their terms. ... These Restrictions were drafted to allow enforcement of restrictive covenants by individual homeowners. ***The non-waiver provision, by its plain language, is intended to prevent a waiver based on prior inaction in enforcing the Restrictions. To hold otherwise would render the non-waiver provision meaningless and violate the expressed intention of the contract among the property owners.***

Burke, 207 Ariz. at 398 at ¶22 (emphasis added). As in *Burke,* Eschelon provided no evidence to suggest why the ALJ should ignore the non-waiver clause in this case. As a result, this provision is enforceable. The Commission must give the provisions that state Qwest "may" charge to expedite an order meaning. To find Qwest bound to follow the old practice of not charging for expedites would constitute "clear error."

The position taken by Eschelon and Staff is also, in and of itself, violative of traditional contract law. Each provision of a contract must be interpreted to give every term in the contract meaning. *Restatement (2nd) of Contracts* §203 cmt. b ("Since an agreement is interpreted as a whole, it is assumed in the first instance that no part of it is superfluous. ... Where an integrated agreement has been negotiated with care and in detail and has been expertly drafted for the particular transaction, an interpretation is very strongly negated if it would render some provisions superfluous.").

Both Eschelon and Staff read the ICA as stating that Qwest must provide expedites using the emergency, "Expedites Requiring Approval" process, and can, therefore, never charge to expedite an order. Qwest's interpretation, on the other hand is that when it expedites a POTS order using the emergency, "Expedites Requiring Approval" process, expedite charges will not apply. However, when Qwest expedites a design services order (such as unbundled loops) using the "Pre-Approved Expedites" process, expedite charges of $200 per day apply. Thus, using Qwest's interpretation of the ICA, expedite charges "may" apply. On the other hand, using Eschelon and Staff's interpretation, expedite charges never apply. It would, once again, constitute plain error to interpret a contract in such a manner as to negate the meaning of a provision. *See, e.g., Kintner v. Wolfe,* 102 Ariz. 164, 167 (Ariz. 1967) (refused to interpret in

manner that would negate a provision). The Commission cannot, therefore, as a matter of law interpret the ICA as requested by Eschelon and Staff.

C. The Parties' Course of Performance In Using CMP to "Develop" Processes Shows the Intent to Develop Contractual Rights in the CMP.

Moreover, even if the contract were ambiguous on this point, then the parties' course of performance is the next weightiest evidence of their intent.

> Where an agreement involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, ***any course of performance accepted or acquiesced in without objection is given great weight in the interpretation of the agreement.***

Restatement (2nd) of Contracts § 202(4) (emphasis added); adopted in Arizona in *Abrams v. Horizon Corp.*, 137 Ariz. 73, 79 (Ariz. 1983). *See also Hubbard v. Fidelity Fed. Bank*, 91 F.3d 75 (9th Cir. 1996) (noting for remand, "course of performance under a contract is to be given great weight in interpreting an ambiguous contract," internal quotation marks omitted); *AmerisourceBergen Corp. v. Dialysist West, Inc.*, 465 F.3d 946, 950-951 (9th Cir. 2006) (in determining ambiguity of contract under the Uniform Commercial Code in Arizona, courts only consider evidence of course of dealing, trade usage, and course of performance). Evidence of course of performance is the best evidence of the parties' intent in their contract, unless the other party objects to it at the time. *See, e.g., Abrams,* 137 Ariz. at 79 (evidence showed that the party had objected to the course of performance at the time it began and pursued his objections throughout the parties' contractual relationship). ***"The acts of parties under a contract, before disputes arise, are the best evidence of the meaning of doubtful contract terms."*** *Associated Students of the Univ. of Ariz. v. Arizona Bd. of Regents,* 120 Ariz. 100, 105, 584 P.2d 564, 569 (Ct. App. 1978) (emphasis added; quoted in *RAJI (CIVIL) 4th Contract* 26 n.4 (Jan. 2005)).

Here, the evidence shows that both Qwest and Eschelon "developed" processes in CMP. Eschelon developed a 911 process in CMP when the ICA instructed the parties to develop a process; Eschelon developed an LNP process in CMP when the ICA instructed the parties to develop a process; Eschelon developed ANSI processes in CMP when the ICA instructed the parties to develop a process; Eschelon even developed the Expedite Process in CMP, where, once again, the ICA states to develop a process. ***See supra.*** Indeed, Eschelon is the most active CLEC in CMP, has requested 228 changes in CMP of which 188 have been implemented. Eschelon, of all companies, knows the purpose of CMP, how it works and its purpose. The parties' course of performance shows both parties used the CMP extensively without objection or complaint. This course of performance is overwhelming. The Commission should see Eschelon's about face for what it is; sour grapes that their course of performance – using CMP to develop processes – did not work to their exclusive benefit this one time. Their allegation that Version 30 violates the ICA is a self-serving about-face that contradicts the parties' years of performance of the contract through CMP. See *Restatement (2nd) of Contracts* §202 cmt. g.[3] That is a far cry, however, from proving breach of contract.

D. Eschelon's Request for Special Treatment For Itself Conflicts with the Parties' ICA, and the CMP.

The only CLEC that has raised a formal concern about Version 30 is Eschelon in this proceeding. ***Exhibit Q-1 (Albersheim Direct) at 9:13-21.*** All other CLECs that want to expedite orders for unbundled loops have opted into Version 30, and are paying the $200 per day

[3] "The parties to an agreement know best what they meant, and their action under it is often the strongest evidence of their meaning. But such 'practical construction' is not conclusive of meaning. Conduct must be weighed in the light of the terms of the agreement and their possible meanings. ... **The rule of Subsection (4) does not apply to action on a single occasion or to action of one party only; in such cases the conduct of a party may be evidence against him that he had knowledge or reason to know of the other party's meaning, but self-serving conduct is not entitled to weight.**" *Restatement (2d) of Contracts,* § 202 cmt. g (emphasis added).

fee. *Id.* Thus, what Eschelon asks the Commission to do is to issue a decision that grants them a benefit over Qwest, interexchange carriers (who purchase via tariff), and other CLECs who utilize the expedite procedures set forth in CMP. This request violates the plain language of the parties' ICA. The Eschelon ICA requires Qwest to treat Eschelon like every other carrier: "[Qwest] shall conduct all activities ... in a carrier-neutral, nondiscriminatory manner." ***Exhibit C-1*** at § 31.1. Thus, Eschelon's ICA requires Qwest to treat all CLECs the same. That is exactly what Qwest is doing. CLECs across the region and 14 CLECs in Arizona have adopted the unbundled loops expedite terms that Qwest and the CLECs developed in CMP. However, Eschelon is asking this Commission to endorse a process for expediting orders for unbundled loops that is superior to the process used by every other CLEC in Arizona. Thus, Eschelon asks the Commission to order Qwest to violate Section 31.1 of the parties' ICA.

Ensuring parity between customers is the exact reason that Qwest submitted Version 30 of the Expedites process to the CMP.

> Version 30 changed the process to create parity across our entire customer base, wholesale and retail alike. In essence, all the expedites for customers and products that filed the design services flow would be subject to the per-day expedite fee. We did understand it would take some time to implement this, so instead of doing it in our allotted 31 days, we extended the time frame two and a half months.

Testimony of Jill Martain at 333:23-334:5. Ms. Martain also explained in response to questions posed by Judge Rodda that a failure to implement one uniform process for all unbundled loops created an incentive to game the system, and the potential for intercarrier squabbles. *Id. at 400:9-403:10.* Therefore, the position taken by Eschelon is inconsistent with the parties' ICA.

E. Qwest's Pre-Approved Expedite Process Provides Eschelon a Meaningful Opportunity to Compete; Eschelon Asks the Commission to Order Superior Service in Violation of the 1996 Act.

1. There is No Retail Analog to the Ordering and Provisioning of Unbundled Analog Loops; Therefore, Every Expedite Request for Such Services Constitutes a Request for a "Superior Service."

One issue in this case is whether Qwest's expedite of ***unbundled loop orders*** for Eschelon constitutes a superior service. Staff and Eschelon claim it is not a superior service because Qwest expedites similar orders for itself. Indeed, much of the Eschelon's and Staff's time at hearing was spent arguing that Qwest would gain a competitive advantage if Qwest did not expedite similar orders for Eschelon. This argument is premised on a faulty assumption: that Qwest has a comparable service to an unbundled loop. It is widely recognized that the provision of 2-wire and 4-wire analog loops have no retail analog. *See e.g., In re BellSouth Corp.,* 13 FCC Rcd 20599, 20717 ¶198 (FCC Oct. 13, 1998) ("the provisioning of unbundled local loops has no retail analogue"); *Id.* at ¶87 n.248 (ordering and provisioning of UNEs generally has no retail analogue); *In re Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* 14 FCC Rcd 20912, 20962 n.248 (FCC Dec. 9, 1999); *21st Century Telecom of Illinois, Inc. v. Illinois Bell Telephone Company,* 2000 Ill. PUC LEXIS 489 *74-75 (Ill. PUC June 15, 2000) (work required to provision an unbundled loop is substantially more extensive than work required to do 'line translation' to provision a retail POTS line). Indeed, Staff itself admitted this very point. ***Exhibit S-1 at 32:19-33:11*** ("When no retail analog exists, the [performance] standard is a benchmark"). ***Staff specifically recognizes: "There is no 'retail analogue for expedites of the installation of unbundled loops."*** *Id.* (emphasis added).

The performance metrics created in and approved by the Commission in the 271 process specifically recognize there is no retail analog for the ordering and provision of unbundled loops. ***Exhibit Q-1 (Albersheim Direct) at pp. 13-15.*** When no retail analog exists, the 1996 Act requires Qwest to provide an "efficient carrier a 'meaningful opportunity to compete.'" *In re Bell Atlantic New York*, FCC 99-404, ¶44 (Rel. December 22, 1999). The law is plain that Qwest provides CLECs, including Eschelon, a meaningful opportunity to compete by virtue of the fact that it satisfies these Commission-approved performance measures. *See e.g., In re Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York,* 15 FCC Rcd 3953 ¶8 (Rel. Dec. 22, 1999); *In re Application by SBC Communications Inc., et al., Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services In Texas,* 15 FCC Rcd 18354, 18361-18362 ¶13 n.33 (FCC Rel. June 30, 2000); *In re Application by Verizon New England Inc. et al., for Authorization to Provide In-Region, InterLATA Services In Maine,* 17 FCC Rcd 11659 ¶7 (FCC Rel. June 19, 2002); *Re U. S. WEST Communications, Inc.,* 2002 WL 1378630, ¶7 (Ariz. Corp. Comm. May 21, 2002). These performance metrics were heavily negotiated with substantial CLEC input during the 271 Process. These benchmarks require Qwest to provision analog loops in five business days. ***Exhibit Q-1 (Albersheim Direct) at pp. 5-7 & 13-15*** (citing www.qwest.com/wholesale/results/roc.html).

A request to provision an order for an unbundled loop faster than the intervals set forth in the 271 docket is by definition a request for a superior service. ***Terry Million Transcript at 518:11-519:2***. Any argument that Qwest would gain a competitive advantage by failing to expedite such orders is baseless, as every commission has found (and even the Staff admits) that

BOCs have no comparable service to analog loops. Thus, a CLEC seeking to expedite an order for an unbundled analog loop is seeking to obtain more than a meaningful opportunity to compete, meaning a superior service. A request to obtain a superior service violates the 1996 Act. *Iowa Utilities Board v.* AT&T, 120 F.3d 753, 812-813 (8th Cir. 1997), *aff'd in part and rev'd in part*, 525 U.S. 366, 397 (1999). A vast percentage of the loops ordered in Arizona are unbundled analog loops. See www.qwest.com/wholesale/results/ roc.html) (AZ performance metrics OP-3 for loops).

This does not mean that Eschelon will be unable to serve customers who need immediate service; it only means that Eschelon will be unable to serve customers that want immediate service with unbundled loops. Eschelon admits that it serves a large percentage of its customers – 17 percent – in Arizona through a product known as QPP. ***Exhibit E-1 (Johnson Direct) at 5:7-15.*** QPP is a POTS service. ***Bonnie Johnson Transcript at 42:8-23.*** Thus, Eschelon can serve such customers using QPP, and can expedite a service order using the emergency Expedites Requiring Approval process applicable to all POTS services. Thus, to the extent a customer needs a line delivered immediately and emergency circumstances exist, Eschelon can order QPP and serve the customer using that method. Qwest will not be able to expedite a comparable service for the same customer because it is bound to follow the same emergency criterion for expediting POTS orders, and it does not offer the functional equivalent of an individual loop – an analog loop – to its retail customers. Thus, any argument that Eschelon would be left high and dry is simply without basis.

Similarly, if Eschelon wants to avoid the $200 per day expedite fee, it can – by ordering the proper service; namely, QPP. ***Bonnie Johnson Transcript at 42:8-23.*** The Commission should not reward Eschelon's inefficient decision to serve a customer using an unbundled loop

instead of QPP. *See, In re Bell Atlantic New York, 15 FCC Rcd at 4098 ¶279* (the Section 251 standard provides "an ***efficient*** carrier a meaningful opportunity to compete") (emphasis added).

2. CLECs are Already Obtaining Superior Service in the Provision of DS1 and DS3 Capable Loops; a Requirement to Expedite for Free (or at TELRIC Rates) Would Only Exacerbate the Problem.

The unbundled loop at issue with the Rehabilitation Center was a DS1 Capable Loop. The performance metrics recognize that DS1 Capable Loops and DS3 capable Loops do have a retail analog, specifically DS1 and DS3 private lines. ***Exhibit Q-1 (Albersheim Direct) at 13:5-18.*** *See also, In re Verizon Pennsylvania, Inc.,* 16 FCC Rcd 17419, 17479 ¶110 (FCC Sep. 19, 2001) (parity between unbundled transport and retail DS3).[4] It is undisputed that, as a result of the 271 docket, Qwest was required to provision these high capacity loops to CLECs faster than they do for their own retail customers. ***Exhibit Q-1 (Albersheim Direct) at 13:5-18.***

Eschelon wants to exacerbate the competitive advantage they already have by forcing Qwest to expedite unbundled loop orders for their customers at no charge when emergency circumstances exist. They then compound the issue even more by asking Qwest to expedite the DS1 loop order that was out of service due to Eschelon's own error, claiming emergency circumstances exist. A CLEC caused outage has never been considered an emergency condition justifying an expedite. ***Jean Novak Transcript at 431:7-12; Bonnie Johnson Transcript at 43:19-44:8.***

An example brings the point home. Assume a mid-sized company moves into Arizona and wants to install a DS1 service, and needs the service tomorrow. Qwest would offer a T1 (the equivalent of a DS1 private line), which, by tariff, has a standard interval of nine business days.

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[4] "In Pennsylvania, the retail analogue for this measure historically has been all retail 'special services,' which predominantly includes relatively simple voice-grade services, rather than the more complex services that CLECs order. ... **The revised retail analogue uses provisioning of retail DS-3s instead of retail special services because the unbundled interoffice facilities Verizon provides to competitive LECs are predominately at the DS-3 level, rather than the voice grade level.**" *Verizon Pennsylvania*, at n.376 (emphasis added).

Qwest would then offer to provide the service to the company so long as they paid an $1800 expedite fee. Another CLEC would order a DS1 Capable Loop (the exact same service offered by Qwest) which, by Commission Decision has a five day interval. Thus, that CLEC could deliver the service to the company so long as they paid a $1000 expedite fee. However, if the Commission adopts Eschelon's interpretation of the ICA, Eschelon could get the service in place at no additional cost. The competitive advantage to Eschelon is staggering and denies Qwest and others in the industry a meaningful opportunity to compete.

Thus, Qwest is providing parity (and better) for unbundled loops and consistently applies the same standard to retail and CLEC customers alike. Qwest's expedite fee for unbundled loops is the same that it charges on retail design services, for interexchange carriers and for wholesale customers ($200 per day). ***Jill Martain Transcript at 329: 13-19***. Given that every commission in the nation to consider the question agrees with Qwest on the point that unbundled loops are not comparable to POTS services, the Commission should deny Eschelon's Motion.

3. Eschelon's Request for Qwest Expedite Service Orders on Unbundled Loops is a Request for Superior Service.

"[B]y its very nature" this case concerns Eschelon's "request to shorten the standard provisioning interval." ***Bonnie Johnson at 24:25-25:4***. For unbundled loops, Qwest's obligation is not one of non-discrimination, but Qwest must provide an "efficient carrier a 'meaningful opportunity to compete.'" *In re Bell Atlantic New York*, FCC 99-404, ¶44 (Rel. December 22, 1999). Qwest does that by provisioning unbundled loops in accordance with the standard provisioning interval. *See e.g., Bell Atlantic New York,* 15 FCC Rcd 3953 at ¶8. Thus, an expedite is, by definition, a request to get more than a meaningful opportunity to compete.

Other state commissions have addressed the concept of whether requests to expedite a service order constitutes a request for a superior service. Both the Kentucky and Florida

Commissions have found the 1996 Act does not require BOCs to provide expedited due dates. For example, the Kentucky Commission ruled:

> The Joint Petitioners contend that expedited service is part and parcel of UNE provisioning. The Commission disagrees. Standard provisioning intervals for service are required pursuant to Section 251. BellSouth should also provide non-discriminatory access to expedited service, but expedited service is not a Section 251 obligation.

In re Joint Petition for Arbitration of Newsouth Communications Corp., 2006 Ky. PUC LEXIS 159 at Issue 86 (Ky. PUC March 14, 2006).

Initially, the FCC's First Report and Order interpreted Section 251(c)(3) of the Act as requiring ILECs to provide "superior" service. The Eighth Circuit struck this language down as violative of the 1996 Act; that portion of the Eighth Circuit's decision was never disturbed by the United States Supreme Court. *See e.g., Iowa Utilities Board v. AT&T,* 120 F.3d at 812-13. A recent decision by the Florida Commission recognized this point, and found requests to expedite orders are requests for superior service. The Florida Commission then specifically rejected a request to require usage of TELRIC rates to requests to expedite:

> It is clear there is no obligation imposed or implied in Rule 51.311(b) that an incumbent render services to a CLEC superior in quality to those provided to a retail customer ***requesting similar services***. *So long as rates are identical for all requesting parties, CLEC and retail alike, parity exists in the provisioning structure for service expedites*, and there is no conflict with Rule 51.311(b). We reiterate that current regulations do not compel an ILEC to provide CLECs with access superior in quality to that supplied to its own retail customers.

In re Joint Petition by NewSouth et al., 2005 Fla. PUC LEXIS 634 *150, Order No. PSC-05-0975-FOF-TP (Fla. PSC Oct. 11, 2005) (emphasis added). In that case, the Florida Commission specifically approved BellSouth's expedite fee of $200 per day for CLECs because BellSouth charged the same fee to expedite similar retail services. *Id.* at *150-151. The Kentucky Commission did the same. *In re Newsouth,* 2006 Ky. PUC LEXIS 159. Thus, two commissions

have specifically approved the exact expedite charge that Qwest implemented with Version 30 in the CMP.

As the Kentucky Commission correctly decided, Qwest provides Eschelon with a meaningful opportunity to compete by provisioning unbundled loops using the standard installation interval. Expedited due dates are not required. The question of whether Eschelon has a meaningful opportunity to compete is simply a question of whether Qwest has met the Commission-approved performance metrics. Qwest has consistently met those obligations. Eschelon cannot prevail under the "meaningful opportunity to compete" standard.

F. This is a Breach of Contract Case; the Relief Staff Recommends Has No Place in a Complaint Case for Breach of Contract.

As stated at the outset of this brief, this is a complaint case for Qwest's purported breach of Eschelon's ICA. The only interconnection agreement in the record is the Eschelon ICA. Despite this, Staff makes many industry wide recommendations for the relief. The specific relief Staff seeks includes:

1. Qwest should continue to support the emergency Expedites Requiring Approval process for "all products" at no additional charge. The Staff recommend that Qwest be held to this standard for all CLECs, not just for Eschelon.

2. Qwest should continue to support the Pre-Approved Expedites Process for design services in non-emergency circumstances for all CLECs, and may be paid some type of fee in those circumstances.

3. That Qwest should reimburse Eschelon the $1800 (if Eschelon paid this amount) because the disconnect in error caused by Qwest was an emergency circumstance that justified an expedite under the Expedites Requiring Approval Process.

4. Qwest should define "design services" in interconnection agreements and tariffs;

5. Qwest should create a PID for expedited orders in CMP; and

6. Rates for expedited due dates should be considered as part of the next cost docket.

Exhibit S-1 (Staff Direct) at 39-40. These recommendations ask for prospective relief that impact the telecommunications industry in Arizona as a whole, and therefore have no basis whatsoever in a complaint case.

Staff is attempting to use this complaint case to obtain relief not only for Eschelon, but for the entire CLEC community. For example, Staff seeks contractual relief for all CLECs without having ever evaluated the facts that pertain to the specific CLEC or even review the specific CLEC's interconnection agreement. Staff asks the Commission to require Qwest to create PIDs unique to expedites without any idea whether the industry believes them necessary. Staff asks Qwest to place a definition of the term "design services" tariffs and interconnection agreements even though that terms is not used any where in those documents. None of the extraordinary relief Staff seeks has any connection to whether Qwest breached Eschelon's ICA and the harm, if any, Qwest caused to Eschelon.

The relief Staff seeks is not appropriate in a complaint case:

> Unquestionably, as a general principle of administrative law, the promulgation of rules and regulations of general applicability is to be favored over the generation of policy in a piecemeal fashion through individual adjudicatory orders. See authorities cited, 59 Cornell Law Review 375, 'The Courts and the Rulemaking Process: The Limits of Judicial Review.'
>
> The rationale of this concept is well set forth in the leading case of Securities and Exchange Commission v. Chenery Corporation, 322 U.S. 194, 67 S.Ct. 1575, 91 L.Ed. 1995 (1947) as follows: 'Since the Commission, unlike a court, does have the ability to make new law prospectively through the exercise of its rule-making powers, it has less reason to rely upon an ad hoc adjudication to formulate new standards of conduct within the framework of the ... Act....'

ACC v. Palm Spring, Utility Co., 536 P.2d 245, 250-51 (Ariz. App. 1975). Staff asks the ACC to ignore this well recognized concept in this complaint proceeding.

It is interesting to note that the Staff itself recognized this very concept in this very case. On March 22, 2007, Administrative Law Judge Rodda issued an order and asked the parties for recommendations about whether she should join the record in this case with the record in the arbitration proceeding between Qwest and Eschelon. Qwest opposed this relief. Staff joined with Qwest and opposed the opposition. Staff, represented by Ms. Maureen Scott, opposed stating that "under Section 252, I think the Commission can only address the issues that were raised in the context of the arbitration in the petition by the petitioner, and then in the answer by ... Qwest." 4/10/07 Transcript at 6. Ms. Scott specifically differentiated between prospective relief (252 arbitrations) and complaint cases ("backward looking").[5]

Staff's comments earlier in this docket are perfectly consistent with the law, and diametrically opposed to the extraordinary relief they seek. A complaint case is an adjudicative proceeding; it is not the proper type of proceeding in which to impose industry wide unbundling requirements. Under Arizona's Administrative Procedures Act ("APA"), Title 51, Chapter 6, a change in existing law must be implemented through a rulemaking proceeding and in accordance with the APA's requirements relating to notice and the opportunity for public comment. Unless specifically exempted, all state agencies (including the ACC) are required to promulgate rules in accordance with the procedures established in the APA. The import of the Commission's compliance with the APA ensures that the requirements of due process are met and that the Commission acts within the scope of its legal authority. The Commission's recent litigation with the Arizona Attorney General over the adoption of slamming and cramming rules (*see Arizona Corp. Com'n, et al. v. State of Arizona ex rel. Terry Goddard,* Arizona Supreme Court No.

[5] Ms. Scott does recognize that Staff seeks prospective relief in this docket, but states "they could be implemented ... through the complaint." This statement is contrary to Staff's statement that complaint proceedings and arbitrations are fundamentally different, as Staff asks the ACC to impose obligations beyond Eschelon on Qwest.

CV-03-0291-SA), provide ample discussion, analysis and authority supporting the need for the Commission's compliance with the APA.

To compound the problem, the relief Staff seeks is without any factual basis.

1. Staff asks the Commission to require Qwest to adhere to certain expedite procedures for all CLECs, and all services. However, the Staff did not introduce other carriers' contracts. The Staff did not contact other carriers. Other carriers were not subject to cross examination. Moreover, testimony was presented that the SGAT did not have any language about expedites in the body of the contract, and contains many references to and incorporates the CMP, thereby distinguishing the SGAT from the Eschelon ICA. ***Renee Albersheim Transcript at 280:25-281:22***. There is simply no basis to believe that the particular provisions at issue in the Eschelon ICA that form the basis of the purported breach have any applicability beyond Eschelon. Finally, Section 252(a)(1) of the Act gives parties the right to negotiate ICAs that conflict with the terms of the 1996 Act:

> Upon receiving a request for interconnection, services, or network elements pursuant to section 251, an incumbent local exchange carrier ***may negotiate and enter into a binding agreement*** with the requesting telecommunications carrier or carriers ***without regard to the standards set forth in subsection (b) and (c) of section 251.***

47 U.S.C. §252(a)(1). The Act is plain; negotiated provisions of ICAs are fully enforceable. Nullifying provisions of several CLEC contracts would violate the plain language of the Act.

2. There is no evidence that Eschelon paid the $1800. Qwest witnesses did not know whether Eschelon paid, and Eschelon did not attempt to prove that they paid. Hence, reimbursement is inappropriate.

3. Similarly, there was substantial testimony that the disconnection of the DS1 Capable Loop due to Eschelon's own error would not allow for an emergency that allowed usage

of the Expedite requiring Approval process even had the old policy remained in effect. ***Exhibit Q-6 (Novak Rebuttal) at pp. 2-5. See generally Jean Novak Transcript Testimony.*** Staff simply "assumed" that a medical emergency existed due to the nature of the facility. ***Staff Transcript at 574:4-10; 575:3-4; 578:19-24; 579:14-17.*** This is simply inadequate proof. Indeed, Staff admitted that Qwest had the ultimate authority to decide whether an emergency condition existed, and Qwest found none existed. *Id. at 580:23-581:9.* Thus, no matter how the issue is evaluated, Qwest appropriately denied the request to expedite the order.

4. Staff's request for a PID ignores that there is a forum that exists for presenting proposals for new PIDs. ***Exhibit Q-2 (Albersheim Rebuttal) at 13:6-11.*** Moreover, the PIDs already include expedited ordered in them thereby negating the need for a new PID. ***Exhibit Q-2 (Albersheim Rebuttal) at 13:12-14:19.*** Staff agreed with Qwest on these points. ***Staff Transcript at 566:20-567:17*** (process already exists for PID development and believes current PIDs already captures expedites). As a result, at hearing Staff appeared to concede that this docket was not the appropriate forum for PID issues. *Id. at 593:2-11.*

5. Staff's request to define "design services" in contracts and tariffs makes absolutely no sense whatsoever. The terms "design services" is not used in either the tariffs or contracts. ***Renee Albersheim Transcript at 223:1-8 & 292:18-0293:2.*** Staff seemed to acknowledge this point: ***Staff Transcript at 567:18-568:5 & 569:18-21.*** Instead the specific product names are used in both the tariffs and the contracts. The specific products named are defined in both the tariffs and the contracts. The Pre-Approved Expedites process specifically names each of the products that it applies to. As Judge Rodda appeared to recognize in her questions, "I mean if they list every single product, isn't that even better than having some higher definition." ***Staff Transcript at 592:12-13.***

The additional relief that Staff requests in its testimony simply has no applicability, factual support, or legal support. The Commission should reject Staff's requests for this extraordinary relief.

IV. CONCLUSION

Eschelon simply does not have the evidence to support its breach contract claim. WHEREFORE, for all of the aforementioned reasons, Qwest respectfully requests that the Commission reject Eschelon's claim, and find in all respects for Qwest.

RESPECTFULLY SUBMITTED this 24th day of October, 2007.

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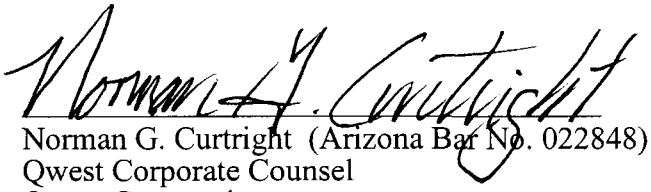

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